No. 26437—*Thelma J. Dalton v. John Doe*

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McGraw, J., dissenting:

I reject the majority's conclusion that *Hamric v. Doe*, 201 W. Va. 615, 499 S.E.2d 619 (1997), had the "clear effect of . . . overrul[ing] established law,"and must therefore be applied only prospectively. While it is true that the *Hamric* Court suggested in a footnote that it was overruling prior case law on the subject,[1] *Hamric* in fact did not work any significant change in West Virginia law. Previous cases, most notably *State Farm Mut. Auto. Ins. Co. v. Norman*, 191 W. Va. 498, 446 S.E.2d 720 (1994), clearly foreshadowed the result reached in *Hamric*. Indeed, *Hamric* was the very first case in which this Court was required to address the ultimate reach of the "physical contact" requirement contained in W. Va. Code § 33-6-31(e)(iii). Thus, the majority's suggestion that *Hamric* marked a departure from previous settled law is simply inaccurate. I would permit *Hamric* to be applied retroactively, as is the Court's custom in all cases of first impression dealing with issues of statutory interpretation.

I likewise disagree with the majority's conclusion that so-called "John Doe" actions must be governed by the general two-year statute of limitation set forth in W. Va. Code § 55-2-12, rather than

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[1]*See Hamric*, 201 W. Va. at 621 n.3, 499 S.E.2d at 625 n.3 (suggesting that holding in *Hamric* was in conflict with *Lusk v. Doe*, 175 W. Va. 775, 338 S.E.2d 375 (1985), where the latter case stated, "In order for the insured to recover from the insurer, upon trial it must be shown that the injuries were incurred after physical contact with the hit and run vehicle."). It is difficult to see how there is any conflict between *Lusk* and *Hamric*, where the former case simply pointed out the existence of the "physical contact" requirement, and the latter undertook the common judicial function of interpreting such terminology.

the ten-year limitation period for contract actions provided by W. Va. Code § 55-2-6. The majority attempts to make a distinction between actions brought directly against an insurer, and cases formally commenced against an unknown defendant in order to collect under insured or underinsured motorist coverage. This is a hollow distinction. In *Plumley v. May*, 189 W. Va. 734, 434 S.E.2d 406 (1993), the Court made clear that an action brought against an insurer in pursuit of insured or underinsured motorist coverage is an action in contract rather than tort. I simply fail to see any reason for treating a John Doe action any differently, where the single object of such proceedings is to recover from the insurer. The majority in this case has plainly exalted form over substance.

For the foregoing reasons, I respectfully dissent. I am authorized to state that Justice Starcher joins in this dissent.